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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2009

John and JoAnne Lawson,
Petitioners,

v.

Citrus County, A Political Subdivision
of the State of Florida,
Respondents.

On Petition for a Writ of Certiorari to the
District Court of Appeal of Florida
Fifth District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Under the law as restated in Caperton v. Massey Coal Company, 556 U.S. _____, 129 S.Ct. 2252 (2009), may an attorney both represent a local government as its legal counsel in land use cases, and serve as a neutral adjudicator in code enforcement proceedings in which the same local government is the Petitioner?

II May a person be convicted for an alleged violation when the violation on which the conviction is based is neither set forth in the charging instrument nor raised at any time prior to the final hearing on the charged violations?

III Does the due process clause of the Fifth Amendment to the Constitution of the United States, as applied to the states through the Fourteenth Amendment, require that land development controls have a provision by which a land owner may seek a variance to those controls – thus avoiding a great and needless hardship entirely disproportionate to the benefit of the control?

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Petitioners state that there is no parent or publicly held company having any interest in this matter.

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OPINIONS BELOW

The Order of the Fifth District Court of Appeal of Florida Denying Motion for Rehearing, Motion for Rehearing En Banc and Alternative Request for Issuance of Written Opinion, issued February 25, 2010, and the opinion of the Fifth District Court of Appeal of Florida denying Petitioners' Petition for Writ of Certiorari to that Court, issued January 19, 2010, (Appendices F and G), are presently unreported. The opinion of the Circuit Court of the Fifth Judicial Circuit of Florida, in and for Citrus County, Florida, (Appendix E) was rendered on August 4, 2009. This opinion is also presently unreported. The relevant Orders and Opinion are reproduced in the Appendices.

STATEMENT OF JURISDICTION

The District Court of Appeal of Florida, Fifth District, rendered its Order Denying Motion for Rehearing, Motion for Rehearing En Banc and Alternative Request for Issuance of Written Opinion on February 25, 2010. The decision of February 25, 2010 is a final judgment rendered by the highest court of Florida in which a decision could be had. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257 (a), providing for the filing of petitions for certiorari

from the highest court of a state from which a decision may be had.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part: "... nor shall any person be ... deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the Constitution of the United States provides in relevant part: " ... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY AND LOCAL PROVISIONS INVOLVED

Chapter 162, Florida Statutes.

This Chapter creates a process by which local ordinances may be enforced by either a Code Enforcement Board or by a "Code Enforcement Special

Master," in order to "provide an equitable, expeditious, effective, and inexpensive method of enforcing any codes and ordinances in force in counties and municipalities, where a pending or repeated violation continues to exist." (§162.02 F.S.)

Citrus County Comprehensive Plan.

A comprehensive plan in Florida is typically a policy document setting mid-and long-term goals, objectives and policies for the development of land, infrastructure and services: it is akin to a constitution which is implemented by statutes and decisional law. The Citrus County Comprehensive Plan also contains certain numeric standards, one of which is at issue herein, as will be discussed infra.

Citrus County Land Development Code.

The Citrus County Land Development Code is intended to implement the Comprehensive Plan and provide detailed regulations for the development of land. Specifically relevant are the following sections:

– 2020: requiring the issuance of a building

permit for the construction of a fence. [1]

- 2021: Requiring a permit for a change of use.
- 2120: Requiring approvals by the Citrus County Planning and Development Review Board
- 2321: Requiring building permits. [2]
- 4120 Requiring a buffer between buildings and waterways.
- 4667. E. 1 Establishing the County process for approving applications to the State of Florida for the sale of alcoholic beverages.

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[1] This issue and a number of other areas of non-compliance with various Citrus County Technical Codes – not raised in the Administrative Complaint – were resolved over the course of the proceedings so that Petitioners' property was in compliance with the code issues raised by Citrus County over the course of these proceedings, except for the change of use issue and the comprehensive plan setback requirement raised for the first time in the final hearing before the Special master.

[2] See footnote 1.

STATEMENT OF THE CASE

For the purposes of the Federal Constitutional Questions Presented, (page I, supra,) the following are the relevant facts.

This Petition involves a story far too common in today's economic climate. Businessman, in this case a fisherman, tries everything possible to keep a historically significant Citrus County, Florida, fish house commercially viable, preserving a critical component of Florida history and providing valuable employment and other benefits to the community, even though the fish are gone. Fighting the trend of a severe decline of fish houses along the Gulf Coast, the property located in Homosassa, Florida, known as the Cedar Key Fish House, was established in 1962 and still survives today.

The Cedar Key Fish House was credited with introducing mullet and mullet roe to the world. Shrimp, stone crabs, oysters, scallops, and other fish were sold retail and wholesale, and alcoholic beverages were provided to thirsty fishermen and their entourage, reflecting an even more widely practiced and centuries old historical fact.

Over the years, a number of incomplete, inconsistent and dismally "informal" zoning and land use designations attached to the subject property. Ultimately, the fish house obtained a vested rights determination rendering it a recognized commercial use. In the belief that the desired plans for the property were carrying forward characteristics that had always been present, the Petitioners sought to obtain an alcoholic beverage license allowing fisherman or individuals simply wanting to enjoy a meal and a drink to do so in view of the natural Florida splendor of the Homosassa River. The local "zoning authority governing your business location" signed off on the State of Florida alcoholic beverage form, stating that "The location complies with the zoning requirements for the sale of alcoholic beverages or wholesale tobacco products pursuant to this application..."

Subsequent to receiving the alcoholic beverage entitlement, the Petitioners spent vast amounts of time, money, and effort improving their property, including improving the historical appearance of the property by constructing a "chickee" hut, which was constructed by the Seminole Indian Tribe in accordance with all applicable state statutes and all building code exceptions attendant thereto (§ 553.73(9), Fla. Stat.).

On September 28, 2007, Citrus County issued Petitioners a "Notice of Violation," alleging that Petitioners had changed the use of a portion of their structure without the required permits, and that Petitioners had constructed a "commercial fence" without a building permit. These "violations" were allegedly precipitated by "complaints" suspected of being underwritten by competitors, but the Petitioners agreed to go through whatever reasonable administrative requirements were necessary to correct the situation.

These efforts, efforts experienced in every community throughout the country, form the basis of the legal issues presented herein. This matter goes to the heart of how quasi-judicial code enforcement matters should be adjudicated, by whom (since there is a trend to allow recently resigned or even sitting government attorneys to participate in prosecuting, advising or even adjudicating such matters), on what "charges" (many such hearings have no prohibition against last minute amendments to the nature of the violations at issue), and whether a variance process should exist to protect those targeted by such last minute modifications to charges to provide an opportunity to prevent the undue hardships caused by an unbending application of land use regulations.

On November 2, 2007, Citrus County issued an "Administrative Complaint and Notice of Hearing," re-alleging the claims from the "Notice of Violation." (Appendix A-2).

Chapter 162, Florida Statutes provides for the enforcement of county and municipal ordinances through a "code enforcement" process, without requiring a local government to prove criminal charges or to seek injunctive or other equitable relief. The purpose of the chapter is to set forth on pages 2 - 3, supra.

Citrus County has elected to avail itself of the procedures permitted and established by Chapter 162. At the time of the commencement of this action, Citrus County utilized an appointed Code Enforcement Board comprised of citizens of the County. After the first proceeding before the appointed, citizen, board, Citrus County changed its procedure to utilize an appointed "Special Master" as permitted by the statute.

The alleged violation was first heard by the Code Enforcement Board on December 19, 2007, and the Board made brief and extremely conclusory findings of fact and conclusions of law and found Petitioners to be "guilty" of the alleged violations. It was clear that the violations could be cured by

amendments to the County's land use controls, and all evidence supported the favorable consideration of these amendments. Accordingly, the Board allowed Petitioners time to cure the violations with a fine to be imposed if the violations were not cured. (Appendix B).

Thereafter, Citrus County changed from the citizen Code Enforcement Board to a single "Special Master," with former Assistant County Attorney, and still counsel for Citrus County, Michele Lieberman, serving as the Special Master in this case. Ms. Lieberman heard the matter several times during 2008 as Petitioners remedied one of the two charges with an "after-the-fact" permit for the fence and as Petitioners attempted to wend their way through the morass of illegal (Appendix C at 12a - 13a; Appendix E at 24a, 27a) and incoherent Citrus County land use regulations to bring their property into compliance with the relevant codes.

As set out in the Circuit Court's Final Order (Appendix E at 27a), these efforts came to naught for a variety of reasons. Accordingly, Ms. Lieberman entered "Amended Findings of Fact, Conclusions of Law and Order," (Appendix C).

Included in Ms. Liberman's final order was the finding:

> Pursuant to testimony set forth by Citrus County, the structure sits 8 feet from the water's edge. The Citrus County Comprehensive Plan, however, requires that all structures be a minimum of 15 feet from the water's edge. (Appendix C at 12a).

This "finding" was critical to Ms. Lieberman's final decision as she referenced it in ¶¶ 2, 3 and 5 of her Conclusions of Law (Appendix C at 13a - 14a).

As evidenced by the charging instruments (Appendix A), this critical allegation was not raised in those instruments. The Code Enforcement Special Master acknowledged that this issue was being raised for the first time, when she entered her final order in this matter (Appendix C at 12a, "Testimony previously provided by the County ... had not revealed the information regarding the setback, ..." and at 14a: "... testimony now presented ..." [Emphasis Added].

Equally as important, as brief and conclusory as the original Code Enforcement Board decision was (Appendix B), it also made no reference to the charge on which Petitioners were ultimately "convicted" – the alleged non-compliance with the Comprehensive Plan.

Further, as the Circuit Court noted (Appendix E, at 28a): "... The Special Master remarked that the

County provided new testimony ..." [Emphasis Added]). This "new testimony" was the issue on which Petitioners' "conviction" was based – an alleged violation of a numeric requirement of the Citrus County Comprehensive Plan – which was raised for the first time in the final hearing before Ms. Lieberman. (In fact, as demonstrated by Appendix I, the allegation is not true as a matter of fact: "At the point closest to the water, the Tiki [Chickee] hut is 15 feet 3 inches away from the water," (Appendix I at 59a.)

Ms. Lieberman then entered her Amended Findings of Fact, Conclusions of Law and Order, finding Petitioners to be in violation of the Citrus County Comprehensive Plan – a point never before raised – thus finding Petitioners guilty of an incurable violation of the Citrus County Land Development Code. Finding the alleged violation by Petitioners to be incurable as a result of the never before raised numeric standard of the Comprehensive Plan, Ms. Lieberman ordered Petitioners to close their business or else face fines that could lead to a lien being imposed on Petitioners' property, the imposition of which lien could lead to the County's foreclosing on Petitioners' property, truly a penal sanction.

At this point, Petitioners were "convicted" by a presumptively neutral magistrate of a violation with

which they were not charged, and for which violation there was no legal means of obtaining a variance. This alleged "violation" arose from Citrus County's approval of the issuance of an alcoholic beverage license by the State of Florida (Appendix E at 24a, ¶ 4), and also arose from Citrus County's void effort to amend its Comprehensive Plan (Appendix E at 27a, ¶ 10).

A direct appeal as a matter of right from Ms. Lieberman's order was taken to the Citrus County Circuit Court, pursuant to § 162.11, F.S. Petitioners submitted their initial brief and Citrus County filed an answer brief. During the preparation of Petitioners' Reply Brief, it came to light that the supposedly neutral Code Enforcement Special Master -- Ms. Lieberman – was also counsel to the Petitioner below – Citrus County. [3] Nowhere on the record, or in the proceedings to this point, was Ms. Lieberman's clear conflict of interest apparent.

This conflict manifests itself when one notes that in Appendices A-2, B and C, Citrus County is identified as "Petitioner" in the proceedings while Citrus County is identified as the Appellee in Save the

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[3] Save the Homosassa River Alliance v. Citrus County, 2 So.3d 329 (Fla. 5th DCA 2008); Citrus County v. Halls River Development, 8 So.3d 413 (Fla. 5th DCA 2009).

Homosassa and as the Appellant in Halls River . Yet the Circuit Court, while acknowledging the issue to be a due process issue (Appendix E at 38a), dismissed this clear conflict as "mere speculation" (Appendix E at 39a), despite the fact that Petitioners provided the Court with both a summary of Ms. Lieberman's invoices to "Petitioner" – the County – as her client (Appendix H), and with the underlying detailed invoices. [4]

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[4] The actual invoices along with the summary found in Appendix H were submitted to the Circuit Court and then became part of the Appendices in the Petition to the Fifth District Court of Appeal.

Ms. Lieberman had recently retired as an Assistant County Attorney for Citrus County and went into private practice with the County as a client. As evidenced by the second column in the Appendix, she apparently did not number her invoices in the early days of her private practice.

The last column on the chart identifies the page numbers in the electronic copies of the invoices as they were submitted below. On June 30, 2008, a second invoice charged Citrus County for Ms. Lieberman's services as the Code Enforcement Special Master. This invoice revealed an hour and a half ex parte meeting with County staff; an ex parte communication that is constitutionally problematic.

Once they realized Ms. Lieberman's dual role as counsel for the County during the same time she was acting as "Special Master" over proceedings involving the County as a party, they made a public records request for the invoices submitted to Citrus County by Ms. Lieberman, receiving copies of a number of invoices Ms. Lieberman sent to the County for "services rendered."

Petitioners raised this issue before the Circuit Court, both in their Reply Brief and in a Motion to Abate and Remand with Instructions. The issue of Ms. Lieberman's disqualification was raised in the terms of both a statutory prohibition against a local government attorney advising a citizen Code Enforcement Board [5] and on Constitutional Due Process Grounds. The Circuit Court denied the Motion to Abate and Remand, but allowed Petitioners to raise this fundamental issue, not theretofore apparent on the record, and ruled that the issue would be given "due consideration." (Appendix D at 19a, ¶ 1.)

The Circuit Court ultimately sustained Ms. Lieberman's ruling on all issues, including the issue of

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[5] Section 162.05(5), F.S. It defies credulity that a local government attorney may not advise a citizen Code Enforcement Board but may sit as such Board.

whether Ms. Lieberman was barred from occupying the dual role of counsel to Citrus County and adjudicator of Citrus County's petition before her as a purportedly neutral special master. [6]

Under Florida law, the next step in the appeal was a discretionary Petition for Writ of Certiorari to the District Court of Appeal of Florida, Fifth District. That Petition was filed, [7] followed by the filing of Answer and Reply Briefs.

The District Court of Appeal denied the Petition for Writ of Certiorari without opinion on January 19, 2010 (Appendix F). The same Court denied Petitioners' Motion for Rehearing, Motion for Rehearing En Banc and Alternative Request for Written Opinion on February 25, 2010. [8]

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[6] When the matter returned to the Special Master from the Fifth District Court of Appeal, this conflict of interest issue was raised. Ms. Lieberman took the issue under advisement and has not yet ruled on it.

[7] And a corresponding Appendix.

[8] Without a written opinion no appeal to the Supreme Court of Florida is permitted: R. J. Reynolds Tobacco Co. v. Kenyon, 882 So.2d 986 (Fla. 2004). Rule 9.330, Fla.R.App.P. permits a party to an appeal to request

The February 25, 2010, Order of the District Court was the final order of any state court from which an order might be had. This Petition for Writ of Certiorari ensued.

REASONS FOR GRANTING THE PETITION

As can be seen in the Circuit Court Order, numerous issues were considered in the Citrus County code enforcement process, and were addressed by the Special Master and subsequently by the Circuit Court. Several of these issues have constitutional implications, but the following three issues clearly merit consideration and resolution by this Court.

This case involves nothing less important than the question of whether the Constitutional mandates of the Bill of Rights apply to the numerous code enforcement proceedings that occur throughout this country every day. Are respondents in code enforcement proceedings entitled to be heard by neutral adjudicators? Are they entitled to be made aware of all the charges on which they might be

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the District Court to issue a written opinion which would permit review by the Supreme Court of Florida.

convicted? Must the regulations under which they were charged have provisions for obtaining a variance?

These are broad legal questions, the resolution of which will affect many persons other than the actual parties. As land use laws become more complex and restrictive, and as code enforcement processes become more common [9] and less formal, moving away from criminal prosecutions and equitable relief, three

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[9] See, e.g. Alabama Statutes, § 36-25-9; Arkansas Code, § 5-54-104; California Health and Safety Code, § 17998.2; Connecticut Statutes, § 8-208; Delaware Code, 10 Del.C. § 2902; Georgia Code, § 36-74-42l; Idaho Statutes, § 39-4116; Illinois Statutes, 55 ILCS 5/5-41020; Kansas Statutes, § 19-4708; Kentucky Revised Statutes, § 65.8801, et.seq.; Louisiana Revised Statutes, § 40:1730.35; Maine Statutes, 30-A, M.R.S.A., § 4451; Maryland Code, § 14-123; General Laws of Massachusetts, c. 14A; Missouri Statutes, § 82, 1029; Montana Statutes, § 50-60-302; Nevada Revised Statutes, § 341.105; New Jersey Statutes, § 2A-1861.1g; New York Consolidated Laws, C. 47, Art. 2; North Carolina, § 143-151-13, N.C.G.S.; Tennessee Code, § 13-6-106; Texas Statutes, § 1952.103. The foregoing are not necessarily the enabling statutes in each state; rather they are statutory references that establish that each of the listed states uses a code enforcement scheme apart from criminal proceedings or proceedings in equity for the enforcement of local government ordinances.

critical due process issues have emerged. These issues are likely to recur time and again, in Florida and in other states implementing these less formal code enforcement processes. The Court's guidance in resolving these matters is required, since critical property rights are clearly implicated in these proceedings.

I. THE DUE PROCESS CLAUSE REQUIRES ADJUDICATORS TO BE NEUTRAL, FAIR AND IMPARTIAL

The Fifth Amendment to the Constitution of the United States, made applicable to the States by the Fourteenth Amendment: Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 234-235 (1897) imposes a broad requirement for substantive and procedural due process in state action against individuals. Included in these due process guarantees is the requirement for a fair and impartial adjudicator in all state actions against individuals.

A "fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136 (1955). This requirement applies to administrative agencies which adjudicate as well as to

courts. Gibson v. Berryhill, 411 U.S. 564, 579 (1973). Withrow v. Larkin, 421 U.S. 35, 46 - 47 (1975)

In In re Murchison, supra, the Court, in addition to citing and relying on Tumey v. Ohio, 273 U.S. 510 (1927), also, citing to Offutt v. United States, 348 U.S. 11 (1954), noted: "But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" Murchison at 136.

In its last term, this Court decided Caperton v. A. T. Massey Coal Company, ___ U.S. ___, 129 S.Ct. 2252 (2009), [10] a case considering the issue of campaign contributions to elected judges. There is no question that the facts in Caperton were extreme and the Court noted the extreme nature of the facts and, to an extent, limited its opinion to those "extreme" facts, although the Court also noted that Courts had generally been capable of applying the "extreme" facts of earlier precedents to the less extreme facts that came before the lower courts. (Id., 129 S.Ct. 2266).

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[10] Caperton was, of course, cited in briefs and pleadings prepared subsequent to its issuance, but Petitioners first raised this issue with the Circuit Court on May 4, 2009, slightly more than a month prior to Caperton being decided.

Notwithstanding this "limitation" to "extreme" cases, Justice Kennedy, writing for the Court, noted:

> Under our precedents there are objective standards that require recusal when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." Withrow v. Larkin, 421 U. S. 35, 47 (1975). (Id., 129 S.Ct. 2257)
>
> It is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process." [In re] Murchison, [349 U. S. 136 (1955)], supra, at 136. ...

Justice Kennedy proceeded to describe the Tumey decision:

> The Tumey Court concluded that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has "a direct, personal, substantial, pecuniary interest" in a case. Ibid. This rule reflects the maxim that "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." The Federalist No. 10, p. 59 (J. Cooke ed. 1961) (J. Madison); see Frank, Disqualification of Judges, 56

> Yale L. J. 605, 611-612 (1947) (same). ... (Id., 129 S.Ct. 2259).

Justice Kennedy then gave two examples of when recusal is required. First was where a judge had a financial interest in the outcome of a case -- the problem in Tumey.:

> The Court held that the Due Process Clause required disqualification "both because of [the mayor-judge's] direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village." Id., at 535. It so held despite observing that "[t]here are doubtless mayors who would not allow such a consideration as $12 [11] costs in each case to affect their judgment in it." Id., at 532. The Court articulated the controlling principle:
>
> > "Every procedure which would offer a possible temptation to the average man as a judge to forget

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Approximately $147 in 2009 – a mere pittance compared to the $25,739 billed by Ms. Lieberman to her client – Citrus County – for her services in the Fifth District Court of Appeal, performed at the same time she adjudicated her client's petitions as the Code Enforcement Special Master.

> the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Ibid.

Justice Kennedy further explained that the Court was: "... concerned with a more general concept of interests that tempt adjudicators to disregard neutrality." (Ibid.).

Citing to Aetna Life Ins. Co. v. Lavoie, 475 U. S. 813 (1986), the Caperton Court went on to hold in the second example:

> The Court stressed that it was "not required to decide whether in fact [the justice] was influenced." Id., at 825. The proper constitutional inquiry is "whether sitting on the case then before the Supreme Court of Alabama '"would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."'" Ibid. (quoting Monroeville, supra, at 60, in turn quoting Tumey, supra, at 532). The Court under-scored that "what degree or kind of interest is sufficient to disqualify a judge from sitting 'cannot be defined with precision.'" 475 U. S., at 822

> (quoting Murchison, 349 U. S., at 136). In the Court's view, however, it was important that the test have an objective component. (Id., 129 S.Ct. 2261)

The Caperton Court further established the critical nature of the issue. Could a former Assistant County Attorney, much less one doing legal work for the County at the same time, actually be sufficiently unbiased to sit in judgment of disputes where the County is a party. This Court stated:

> ... the Due Process Clause has been implemented by objective standards that do not require proof of actual bias. See Tumey, 273 U. S., at 532; Mayberry, 400 U. S., at 465-466; Lavoie, 475 U. S., at 825. In defining these standards the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." Withrow, 421 U. S., at 47. (Id., 129 S.Ct. 2263)

Thus, the Caperton Court repeated that proof of actual bias is not required. (Id., 129 S.Ct. 2263)

The Court in Caperton relied on Tumey v. Ohio, supra, which is particularly helpful, as follows:

> ... But it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case. (Id., at 523).

Chapter 162, F.S., specifically states that proceedings under that chapter are not criminal in nature. But that disclaimer does not change the fact that Petitioners are at risk of being deprived of their property through the operation of lien which could lead to foreclosure on their property. Said lien may be imposed as the result of the "conviction" of Petitioners by a special master who had a direct and substantial pecuniary interest in ruling for her client – the County which was the petitioner before her in the subject proceeding.

The Tumey Court went on to hold: "... in analogous cases it is very clear that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable.

[Citations omitted, Emphasis Added] (Id., at 524). Ms. Lieberman's pecuniary interest was hardly "slight;" she billed Citrus County $25,739 for her services as the County's advocate before the District Court of Appeal during the same time she adjudicated the Petitioners' case.

Furthermore, a proceeding before a less than impartial judge is not a "harmless constitutional error:" "This Court previously has declined to apply harmless error analysis to certain categories of constitutional error. See, e.g., ... [citing Tumey] (trial before an impartial judge)." Dawson v. Delaware, 503 U.S. 159 (1992) at 169, Blackmun, J., concurring. See, also, Arizona v. Fulminante, 499 U.S. 279 (1991) at 309; Young v. U.S. ex rel. Vuitton et Fils S. A., 481 U.S. 787 (1987) at 810.

In Edwards v. Balisok, 520 U.S. 641, 647 (1997), Tumey was applied to hearing officers. In Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California 508 U.S. 602 (1993), the Court, after citing Tumey, held:

> ... Before one may be deprived of a protected interest, whether in a criminal or civil setting, see Marshall v. Jerrico, Inc., 446 U.S. 238, 242, and n. 2 (1980), one is entitled as a matter of due process

> of law to an adjudicator who is not in a situation "'which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true. . . .'" Ward, supra, at 60 (quoting Tumey, supra, at 532). Even appeal and a trial de novo will not cure a failure to provide a neutral and detached adjudicator. 409 U.S., at 61.
>
> "[J]ustice," indeed, "must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." Marshall v. Jerrico, Inc., supra, at 243 (citations and internal quotation marks omitted). This, too, is no less true where a private party is given statutory authority to adjudicate a dispute, and we will assume that the [possibility] of bias, if only that stemming from the trustees' statutory role and fiduciary obligation, would suffice to bar the trustees from serving as adjudicators of Concrete Pipe's withdrawal liability. Id., at 617 - 618.

And it must be again stressed that Tumey also applies to "quasi-judicial" proceedings: Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) at 248 as well as to

"administrative proceedings." Withrow, supra at 46; Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

Tumey was discussed with a critical eye toward conflicts of interest created by pecuniary variables:

> ... this Court held that a conviction could not stand because a small part of the judge's income consisted of court fees collected from convicted defendants. Although in Tumey it appeared the amount of the judge's compensation actually depended on whether he decided for one side or the other, that is too small a distinction to allow this manifest violation of the strict morality and fairness Congress would have expected on the part of the arbitrator and the other party in this case. ... Commonwealth Coatings Corp. v. Continental Casualty Co. et al. 393 U.S. 145, 148 (1968)

In the instant case, Ms. Lieberman had a statutory, ethical, and fiduciary obligation to her client, Citrus County, in pursuing its appeals before the Court of Appeal of Florida, and she could neither appear nor serve as a neutral adjudicator of petitions brought by her otherwise "client" in code enforcement proceedings where she sat as a "Special Master".

In Marshall v. Jerrico, supra, the Court (citing Ward and Tumey) clearly identified the applicability of these ethical considerations to quasi-judicial proceedings: "The rigid requirements of Tumey and Ward, designed for officials performing judicial or quasi-judicial functions, ... (at 248) [Emphasis Added], thereby applying these standards to cases such as the one at issue. The Court further noted that the requirement for a neutral judge was a "strict" requirement (at 250) and that impartiality: "... serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime; ..."

Chief Justice Roberts summarized the law going back to Tumey in 1927, and re-stated in Caperton, supra, as: being the showing of "a probability of bias." Id., at 2267. Since the Court specifically noted that "actual bias" need not be proven, (Id., at 2263), this summary is clearly correct.

> The plea was not guilty and he was convicted. No matter what the evidence was against him, he had the right to have an impartial judge. Tumey, supra at 535

As "less formal" code enforcement proceedings become more commonplace, and as proceedings all over the country utilize former or current municipal, county, or "corporation" attorneys, constitutional

guidance for these procedures is required. Included in this guidance should be a clear mandate from this Court as to the need for impartial adjudicators.

This Petition provides the Court with the opportunity to speak to this issue of increasing national importance.

II. THE DUE PROCESS CLAUSE REQUIRES THAT ANY CONVICTION BE BASED ON CHARGES MADE IN THE CHARGING INSTRUMENT

It is beyond dispute that Petitioners' "conviction" was based on information not included in the original or any charging instruments (Appendix A), or previously raised in the Code Enforcement proceedings:

> ... Testimony previously provided by the County at prior hearings had not revealed the information regarding the setback and recommended denial of the Planned Development Overlay application. (Appendix C at 12a).

The Circuit Court also notes that this issue was not raised previously:

> ... The Special Master remarked that the County provided new testimony that the structure sits 8 feet from the water's edge but the Comprehensive Plan requires a minimum of a 15 foot setback. ... (Appendix E at 28a). [Emphasis Added]

The import of this new charge is clear:

> ...As such, Respondents' new use of the structure must comply with the County's Comprehensive Plan, including the 15 foot setback requirement. ... (Appendix C at 13a).

As noted, supra and Appendix 1, as a matter of fact the setback conforms to the requirement – a point Petitioners could have made if they had known of the existence of the charge.

Thus, Petitioners were convicted by the Special Master based on a charge that both the Special Master and the reviewing Court acknowledge was made for the first time at the last hearing before the Special Master.

In addition to stating with clarity exactly who may adjudicate matters such as these, it is equally as important for the Court to set a rational standard on

what may be adjudicated and prevent manifest departures from due process such as occurred in the instant case.

This Court has long held that a person may not be convicted on an offense with which he is not charged. This fundamental requirement was espoused in two decisions announced on one day in 1948.

In Cole v. Arkansas, 333 U.S. 196 (1948), the Court stated:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. In re Oliver, 333 U.S. 257, 273, decided today, and cases there cited. ... It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. De Jonge v. Oregon, 299 U.S. 353, 362. Id., at 201.

The Constitutional mandate that no person may be convicted of an offense with which he was not

charged could not be more clearly expressed. In Jackson v. Virginia, 443 U.S. 307 (1979), the Court, relying on Cole stated:

> It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process. Cole v. Arkansas, 333 U.S. 196, 201; Presnell v. Georgia, 439 U.S. 14. These standards no more than reflect a broader premise that has never been doubted in our constitutional system: that a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend. E.g., Hovey v. Elliott, 167 U.S. 409, 416-420. ... Id., at 314.

Earlier, the Court held:

> To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused. See Eaton v. Tulsa, 415 U.S. 697, 698-699 (1974) (per curiam); Garner v. Louisiana, 368 U.S. 157, 163-164 (1961); Cole v. Arkansas, 333 U.S. 196, 201 (1948); De Jonge v. Oregon, 299 U.S.

> 353, 362 (1937). ... Dunn v. United States 441 U.S. 100, 106 - 107 (1979).

The principle of Cole and its progeny was applied to a context other than a criminal charge – the disbarment of a lawyer – in In re Ruffalo, 390 U.S. 544 (1968), modified on other grounds, 392 U.S. 919, (1968). The Court held, in a closely analogous situation:

> These are adversary proceedings of a quasi-criminal nature. Cf. In re Gault, 387 U.S. 1, 33. The charge must be known before the proceedings commence. ... (Id., at 551).

Cole and Ruffalo were collectively followed in Gray v. Netherland, 518 U.S. 152, (1996). Earlier, in Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, (1974), the Court held that a defendant is entitled to know: "... the factual material on which the agency relies for decision so that he may rebut it, ..." Id., at 288, note 4. Thus, the constitutional requirement for notice of charges has been made applicable by this Court to administrative and quasi-judicial proceedings, such as the proceeding below.

Concurring in part and dissenting in part in Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985), Justice Brennan

noted: "The mere opportunity unsuccessfully to bring procedural violations to the attention of an appellate-type forum obviously does not constitute the meaningful 'chance to be heard' that is guaranteed by the Due Process Clause. Cole v. Arkansas, 333 U.S. 196, 201-202 (1948)." Id., at 673 note 21.

In his opinion concurring in part in In re Oliver, 333 U.S. 257 (1948), Justice Frankfurter stated: "... Due notice of the charge and a fair opportunity to meet it, are indispensable. ..." Id., at 284. Likewise: "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense — a right to his day in court — are basic in our system of jurisprudence." Id., at 273, opinion of the Court.

Because of the frequency with which code enforcement proceedings such as the instant scenario are appearing throughout the country, and the "relaxed" way in which charges are made and decided at such hearings, it is likely that the cost associated with trying to correct such situations would lead to similar denials of due process capable of repetition yet evading review. Such situations call for the Court to exercise its power by accepting this Petition.

There is no question that the Petitioners were "convicted" in a quasi-criminal procedure – with the

ultimate penalty of the likely loss of their real property – of a charge with which they were never charged or notified until they appeared at the last of several enforcement hearings prior to their ultimate conviction. The clearly established jurisprudence of this Court proscribes such a conviction, yet no decision of this Court deals with this specific question in this context. Accordingly, the instant Petition should be granted.

III. THE DUE PROCESS CLAUSE REQUIRES VARIANCE PROCEDURES TO PREVENT UNDUE HARDSHIP

A comprehensive "...plan is likened to a constitution for all future development within the governmental boundary." Machado v. Musgrove, 519 So.2d 629, 632 (Fla. 3d DCA 1987), citing O'Loane v. O'Rourke, 231 Cal.App.2d 774, 782, 42 Cal.Rptr. 283, 288 (1965). The governing Florida Statute defines a comprehensive plan as:

> (1) The comprehensive plan shall consist of materials in such descriptive form, written or graphic, as may be appropriate to the prescription of principles, guidelines, and standards for the orderly and balanced future economic,

> social, physical, environmental, and fiscal development of the area. § 163.3177 (1) F.S., 2009.

Notwithstanding the concept that a comprehensive plan should basically consist of goals, objectives and policies, some comprehensive plans, such as Citrus County's, contain unbending objective requirements. Included in these requirements in Citrus County, is the requirement that no building be built closer than 15 feet to the water's edge. [12] As set out in Part II of this Petition for Writ of Certiorari, Petitioners were "convicted" of violating this requirement even though it was not alleged in the charging instruments, nor raised in the code enforcement proceedings prior to Petitioners' final conviction.

However, this issue relates to the absence of a process to secure a variance from this objective standard. As both the Special Master and the Circuit Court noted, there is no process by which a variance from this numeric requirement can be obtained (Appendix C at 14a, Appendix E at 40a - 41a).

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[12] Citrus County Comprehensive Plan, Future Land Use Element, § 17-17.31.8, p. 10-184.

The absence of the ability to obtain a variance in these circumstances deprives Petitioners and all those similarly situated of the due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

This requirement of providing procedures to obtain variances, is extensively recognized in state courts throughout the country: "the purpose of a variance is to afford a safety valve," Crone v. Town of Brighton, 119 N.Y.S.2d 877 (N.Y. Int. App. 1952): "The true variance, ... is designed to preserve the constitutionality of the legislation," Reynolds v. Zoning Board of Review of Town of Lincoln, 191 A.2d 350 (R.I. 1963); "A variance is designed as an escape hatch," Lincourt v. Zoning Board of Review, City of Warwick, 201 A.2d 482 (R.I. 1964); a variance is "a necessary part of every zoning ordinance to prevent its constitutionality from being challenged," Bieger v. Village of Moreland Hills, 209 N.E.2d 218 (Oh. Int.App. 1965); a variance "is designed to provide relief from the strict letter of the regulations, protect zoning regulations from constitutional attack, alleviate an otherwise unjust invasion of property rights," Palmer v. Board of Zoning Adjustment, 287 A.2d 535 (D.C. App. 1972); the purpose of a variance is to prevent a zoning ordinance from being unconstitutionally confiscatory, Clerics of Saint Viator v. District of

Columbia Board of Zoning Adjustment, 320 A.2d 291 (D.C. App. 1974).

See also: Azalea Corporation v. City of Richmond, 112 S.E.2d 862 (Va. 1960); Kent County Land Company v. Zoning Board of Review of the City of Warwick, 216 A.2d 511 (R.I. 1966); Bouley v. City of Nashua, 205 A.2d 38 (N.H. 1964); Consolidated Management, Inc. v. City of Cleveland, 452 N.E.2d 1287 (Oh. 1983); National Land and Investment Company v. Kohn, 215 A.2d 597 (Pa. 1965); Greenawalt v. Zoning Board of Adjustment of the City of Davenport, 345 N.W.2d 537 (Iowa 1984); and Vinson v. Medley, 737 P.2d 932 (Ok. 1987).

At an early time in land use control law, this Court, itself, identified the need for a variance process. The year after this Court decided the seminal case approving zoning as a technique for the control of land use: Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the Court decided Gorieb v. Fox, 274 U.S. 603 (1927). In Gorieb, the Court held:

> ... The proviso evidently proceeds upon the consideration that an inflexible application of the ordinance may under some circumstances result in unnecessary hardship. In laying down a general rule, such as the one with which we are here

> concerned, the practical impossibility of anticipating and providing in specific terms for every exceptional case which may arise, is apparent. And yet the inclusion of such cases may well result in great and needless hardship, entirely disproportionate to the good which will result from a literal enforcement of the general rule. Hence the wisdom and necessity here of reserving the authority to determine whether, in specific cases of need, exceptions may be made without subverting the general purposes of the ordinance. We think it entirely plain that the reservation of authority in the present ordinance to deal in a special manner with such exceptional cases is unassailable upon constitutional grounds. Wilson v. Eureka City, 173 U.S. 32, 36-37; In re Flaherty, 105 Cal. 558, 562; Ex parte Fiske, 72 Cal. 125, 127. Id., at 607 [Emphasis Added]

Regardless of these authorities, communities all over the country have adopted land use controls that are devoid of the constitutionally mandated opportunity for a variance. The instant action provides the Court with an opportunity to prevent further loss of this long overlooked, yet valuable property right – to simply be able to secure a variance in the event of an unnecessary hardship.

The application of the 15 foot rule in the Citrus County Comprehensive Plan requires its inflexible application, here, and in many other potential cases, of an unnecessary hardship, a hardship which is disproportionate to the good that might result from the enforcement of the general rule.

Gorieb established a fundamental linchpin of land use controls – the need for the "safety valve" or "escape hatch" of a variance process. It is not a reach to call the Gorieb requirement for a variance process – announced the year after Euclid – the sine qua non of land use controls.

The absence of a process to obtain a variance from the numeric standards of the Citrus County Comprehensive Plan violates the due process requirements of the Fifth and Fourteenth Amendments to the Constitution of the United States. It is time to reaffirm this essential and fundamental right.

CONCLUSION

While many issues come before this Court with great regularity, and the path taken is often motivated by enormous amounts in controversy, few code enforcement cases, and none in the last 43 years,

actually make the journey to this point. Obviously the time and expense needed to bring a relatively minor "code enforcement" issue before the Supreme Court of the United States explains this apparent infrequency.

Critically, however, the trend across the nation is to move toward quasi-judicial hearings such as that at issue in the instant action to serve as the forum in which fundamental property rights are adjudicated. This case provides this Court with an exceptional opportunity to establish a modern framework for such matters one that can ensure fairness in who hears the matters, fairness in what charges may be prosecuted, and fairness in eliminating the undue hardships invariably caused by the absence of variances processes in land uses controls.

The exercise of this Court's resources will stand in good stead: land owners, the public at large, local governments and the Courts will all benefit from this much needed guidance. The efficacy of this less formal process is evident by the small number of code enforcement issues that have made their way to the Federal Courts.

When this Court has dealt with issues arising from code enforcement proceedings, the Court has extended Constitutional protections of the Bill of

Rights to land owners. The Court has held that the Fourth Amendment requires the issuance of a warrant "to effect unconsented administrative entry and inspection of private commercial premises," See v. City of Seattle, 387 U.S. 541 (1967); and Camara v. Municipal Court, 385 U.S. 523, (1967) (applying the same principle to residential uses). The instant action presents an opportunity to ensure fairness, appropriate recognition of due process, and proper administration of such matters in the days to come.

Glaringly absent from the proceedings below is the due process mandated by the Fifth and Fourteenth Amendments to the Constitution of the United States. Petitioners were denied a fair and impartial adjudicator; they were "convicted" based on a charge not included in the charging instrument, and not raised until the final hearing before the Special Master, and the offense of which they stand convicted is a numeric provision of a land development control which lacks the constitutionally mandated variance process. With no guidance from the Court, such repugnant experiences will surely be repeated all over the country.

Petitioners respectfully submit that the foregoing reasons support the instant petition for writ

of certiorari. It is respectfully requested that the Court grant review in this matter.

Respectfully submitted,

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Clearwater, Florida 33764
Telephone (727) 536-2100
Facsimile (727) 536-2110
Counsel for Petitioners

APPENDICES

Appendix A-1

SEAL

Board of County Commissioners
Department of Public Safety
Code Enforcement Section
3600 W. Sovereign Path, Suite 292,
Lecanto, Florida 34461
352-527-7665

NOTICE OF VIOLATION

September 28, 2007

Citizen Complaint # 0701-007 Amended
BOCC # JV-07-47

John and Joanne Lawson
5590 South Boulevard Drive
Homosassa, FL 34448

On July 2, 2007, the following initial violation was observed on property located at: 5590 South Boulevard Drive, Homosassa, FL, legally described as: [LEGAL DESCRIPTION OMITTED]

Violation: Change of use of a portion of the above structure without required Level Two PDRB approval and permits & installation of a commercial fence requires a valid building permit, pursuant to Chapter 2, Sections 2020 Development Orders Required;" 2021"

Change of Use;" 2120 "'Planning and Development Board Action – Level Two;" & 2321 "building permits," Citrus County Land Development Regulations.

Effective action required: obtain Level Two PDRB approval for a bar and obtain an after-the-fact building permit for fence.

Time for correction: The above condition must be corrected and the property brought into compliance not later than October 31, 2007.

Should this violation continue beyond the time specified for correction, the Code Enforcement Section will request a PUBLIC HEARING before the Code Enforcement Board. If the violation is corrected and then recurs or if the violation is not corrected by the time specified for correction, the case may still be presented to the Code Enforcement Board even if the violation bas been corrected prior to the Board hearing. If this is a repeat violation, the Code Enforcement Board also retains the right to schedule a hearing to determine costs and impose the payment of reasonable enforcement fees even if the violation is corrected as required by the Enforcement Official.

Appendix A-1

The Code Enforcement Board has the power to issue orders having the force and effect of law; to order abatements and repairs; to establish and levy fines up to $250 per day for first offenses, up to $500 per day for repeat violations, and up to $5000 per violation for irreparable or irreversible violations. Fines and penalties imposed by this Board become interest accruing liens filed with the Clerk of Court.

If you transfer ownership of the aforementioned property prior to hearing, you must disclose this existence of this violation to the transferee and provide notice of the transfer to the Enforcement Official as required by Florida Statute section 162.06. Failure to do so creates a presumption of fraud in the transaction.

Thank you for your cooperation in correcting this violation,

/S/
Bill Harms
Code Inspector

SEAL

Board of County Commissioners
Department of Public Safety
Code Enforcement Section
3600 W. Sovereign Path, Suite 292,
Lecanto, Florida 34461
352-527-7665

Department of Public Safety,
Code Enforcement Section,
Petitioner,

vs.

Case # 0707-007
November 2, 2007

John and Joanne Lawson
5590 South Boulevard Drive
Homosassa, FL 34448
Respondents,

Administrative Complaint and Notice of Hearing.

COMES NOW, the Petitioner, the Department of Public Safety, and files this Administrative Complaint against John & Joanne Lawson, herein after referred to as Respondents. The undersigned Enforcement Official hereby gives notice to the Citrus

County Code Enforcement Board and the Respondents that an initial violation of the Citrus County Code of Ordinances or the Citrus County Land Development Code, as set forth herein, remains at the following address: 5590 S. Boulevard Drive, Homosassa, FL, as more particularly described below.

Petitioner further states that Respondents have failed to correct such violation as required by the Notice of Violation issued on September 28, 2007, and that this matter shall be presented to the Citrus County Code Enforcement Board on December 19, 2007 at 9:00 a.m. in Room # 166, Lecanto Government Center, 3600 W. Sovereign Path, Lecanto, Florida 34461. Important rights affecting your interest in this property will be adjudicated at this hearing. Legal Description: [OMITTED]

Violation: Change of use of a portion of the above structure without required Level Two PDRB approval and permits & installation of a commercial fence requires a valid building permit, pursuant to Chapter 2, Sections 2020 "Development Orders Required;" "2021 "Change of Use;" 2120 "Planning and Development Board Action Level Two;" & 2321 "building permits," Citrus County Land Development Code.

Appendix A-2

Violation first observed: September 28, 2007
To have been corrected by: October 31, 2007

/S/
William Harms
Enforcement Official

Note: If corrective action is taken and the aforementioned violation is abated as verified by the Enforcement Official, such official may request the Code Enforcement Board Secretary to withdraw this matter from consideration by the Board.

Appendix B

CODE ENFORCEMENT BOARD OF CITRUS COUNTY, FLORIDA

COUNTY OF CITRUS
Petitioner,
vs. CEB Case No. 0707-007

John & Joanne Lawson
5590 S. Boulevard Dr.
Homosassa Springs, [sic] FL 34448
Respondent(s).

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS CAUSE came on for public hearing before the Board on December 19,2007, after due notice and the Board having heard testimony from the code inspector under oath and received evidence, thereupon issues its Findings of Fact, Conclusions of Law and Order, as follows:

I. FINDINGS OF FACT:
Change of use without Level Two PDRB approval and permits.

II. CONCLUSIONS OF LAW:

Citrus County Land Development Code or the Citrus County Code of Ordinances

III. ORDER:

Based upon the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, it is hereby ORDERED THAT:

The Respondent was found guilty and granted until Febr 11, 2008 to abate the violation. If the violation is not brought into compliance as ordered by the Board, a penalty of up to $250.00 per day may be imposed. This fine will be recorded and will constitute a lien on the real or personal property of John and Joanne Lawson.

DONE AND ORDERED this the 26th day of December 2007, at Lecanto, Florida.

CODE ENFORCEMENT BOARD
OF CITRUS COUNTY, FLORIDA

BY: /S/
William Winkel, Vice-Chairman

I HEREBY CERTIFY that a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS

OF LAW AND ORDER has been furnished via U.S. Certified Mail to John and Joanne Lawson, this the 8th day of ~~December, 2007~~ January, 2008

/S/

Recording Secretary.

Appendix C

CODE ENFORCEMENT SPECIAL MASTER OF CITRUS COUNTY, FLORIDA

COUNTY OF CITRUS
Petitioner,
vs.
JOHN & JOANNE LAWSON
5590 S. Boulevard Drive CE Case No. 0707-007
Homosassa, FL. 34446 [sic]
Respondents.
[Information showing recording in Citrus County Official Records omitted]

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS CAUSE came on for public hearing before Citrus County Code Enforcement Special Master Michelle Lieberman on November 19, 2008, after due notice and the Special Master having heard testimony from the Code Officer and other witnesses under oath and received evidence, thereupon issues her Findings of Fact, Conclusions of Law and Order, as follows:

I. FINDINGS OF FACT:

Appendix C

After an investigation by Code Officer William Harms, a notice of violation was issued to the Respondents alleging in [sic] violation of Citrus County Land Development Code Section 2020 "Development Orders Required"; 2021 "Change of Use"; 2120 "Planning and Development Review Board Action-Level Three"; 2321 "Building Permits" for change of use without Level Two PDRB approval and permits and installation of a commercial fence without a permit.

The Citrus County Code Enforcement Board, on December 19, 2007, found Respondents guilty, and ordered Respondents to abate the violations by February 11, 2008, or a fine of up to $250.00 per day could be imposed thereafter. Such matter, upon a modification of the Citrus County Code of Ordinances, was transferred to the Special Master. As of November 16, 2008, the maximum fine that could be imposed is $70,250, which sum reflects 281 days of violation from February 12, 2008 through November 18, 2008.

The change of use in this case occurred upon modification of a structure located on Respondents [sic] property, which structure was previously a freezer, to a restaurant and bar establishment. As testified to, this structure had been there for a significant period of time. To bring the structure into compliance,

Respondents must first have the proper zoning. Second, Respondents must permit the structure itself.

Pursuant to testimony set forth by Citrus County, the structure sits 8 feet from the water's edge. The Citrus County Comprehensive Plan, however, requires that all structures be a minimum of 15 feet from the water's edge. Respondents have applied for a Planned Development Overlay as part of the process to permit the structure itself. The County testified that such application was recommended for denial as it could not meet the requirements of the County's comprehensive plan. Testimony previously provided by the County at prior hearings had not revealed the information regarding the setback and recommended denial of the Planned Development Overlay application.

II. CONCLUSIONS OF LAW:

The Respondents have previously been found guilty and continue to be in violation of the Citrus County Land Development Code. One manner in which the Respondents may abate the violation is to receive a permit for the new use of the structure. To receive a permit, Respondents must first have the proper zoning. Currently, the proper zoning does not exist. While there are questions surrounding the current land use

designation as set forth in the Citrus County Comprehensive Plan, such issues are not dispositive of Respondents' ability to obtain a permit.

The questions surrounding the future land use designation are based upon the validity or invalidity of a 2006 ordinance amendment modifying Citrus County's Generalized Future Land Use Map, which map is part of the County's Comprehensive Plan. Invalidation of said ordinance, while impacting the designation of Respondents' land on the County's future land use map, does not similarly impact the other portions of the County's Comprehensive Plan, including those textual provisions requiring a minimum 15 foot setback from the water's edge for all structures.

In addition to having the proper zoning, Respondents must also properly permit the structure. While it is correct that the structure itself has been there for a considerable period of time at 8 feet from the water's edge, it existed as a freezer. Therefore, as a freezer, the structure was a nonconforming use. As a matter of law, a nonconforming use cannot be modified to a different use and maintain its status as a lawful nonconformity. As such, Respondents' new use of the structure must comply with the County's

Comprehensive Plan, including the 15 foot setback requirement. Moreover, as required by Chapter 163, Fla. Stats., the County may not issue any development order in violation of its Comprehensive Plan. One may not lawfully obtain a variance from the Comprehensive Plan.

Therefore, while Respondents may abate the violation by properly permitting the structure, it appears clear based upon the evidence and testimony now presented by the County that the structure cannot be permitted as it currently sits.

Moreover, merely closing the business cannot abate the violation. The violation did not occur upon the opening of the structure for business. Rather, the violation for which Respondents were cited occurred upon the modification of the structure itself, which modified the otherwise valid nonconforming use. As such, absent a textual amendment to the County's Comprehensive Plan, it appears only the restoration of the structure to its valid nonconforming state can abate the violation.

Although a fine of $70,250 may be imposed, the testimony has been, and continues to be, that Respondents have made a substantial effort to obtain permitting. However, based upon the testimony of the

County, such efforts now appear futile. As Respondents continue to be in violation of the Citrus County Land Development Code, and considering the factors set forth in Chapter 162, Fla. Stats., a fine for said violation is appropriate.

Citrus County v. Lawson
CE Case No. 0707-007

III. ORDER:

Based upon the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW, it is hereby ORDERED THAT:

A fine of $25,000, reflecting the Respondents' ongoing violation from February 12, 2008 through November 18,2008, is imposed as a lien of record. Said lien shall not be filed in the public record until thirty days from the date of this order have passed. If Respondent fails to file an appeal during this time, the lien may be recorded. If an appeal is filed, the lien shall not be filed in the public record until such time as all appeals are exhausted and any order thereon is final.

The continuing fine shall be set, from November 19, 2008 forward, at $100 per day. The matter is

continued until February 18, 2009. Fines that have accrued as of that date may be imposed at that time if Respondents property remains in violation.

DONE AND ORDERED this the 9th day of December 2008, at Lecanto, Florida.

BY: */S/*
Michele Lieberman
Special Master

I HEREBY CERTIFY that a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER has been furnished via U.S. Certified Mail to John and Joanne Lawson, this the 16th day of December, 2008.

/S/
Recording Secretary

I HEREBY CERTIFY that as an Agent of the Citrus County Department of Development Services, the office, to whose custody the original Order is entrusted, this is a true and correct copy of the document maintained on file in the Code Enforcement records of Citrus County, Florida.

Appendix C

/S/

Recording Secretary
Citrus County Code Enforcement
Hearing for Citrus County
Department of Development
Services

3

Appendix D

IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT
IN AND FOR CITRUS COUNTY, FLORIDA

JOHN LAWSON and
JO ANNE LAWSON,
Appellants,

vs. CASE NUMBER: 2008-CA-007192
CE Case Number: 0707-007

CITRUS COUNTY, a political
subdivision of the State of Florida,
Appellee.
_____/

ORDER ON APPELLANTS' MOTION TO ABATE APPEAL AND FINAL ORDER ON APPELLANTS' REQUEST FOR ORAL ARGUMENT

THIS CAUSE came before the Court upon the Appellants' Motion to Abate Appeal and Remand with Instructions, and the Appellants' previous Request for Oral Argument. And the Court having reviewed the record and being otherwise fully advised of the premises, finds as follows:

Appendix D

1. The Appellants state that the Code Enforcement Special Master is barred by statute from serving as the Special Master and request to abate this appeal with instructions to remand the matter to a fair and impartial Code Enforcement Board for new proceedings. The Court will not abate the appeal. However, as the Appellants have pointed out in their motion, due process issues that are not apparent in the record may be raised for the first time on appeal. Sparks v. State, 740 So.2d 33 (Fla. 1st DCA 1999). A review of the Appellants' Reply Brief reveals that the Appellants have raised the issue and the matter will be given due consideration in these proceedings.

2. In a previous Order, this Court reserved ruling on the Request for Oral Arguments until a later date. At this point, no further briefs are permitted. Accordingly, the Appellants' Request for Oral Argument is granted. Each side will strictly adhere to the 20 minutes time limit for arguments. See Fla.R.App.P. 9.320. Accordingly, the Plaintiff and Defendant will coordinate with Judge's Judicial Assistant to schedule a hearing for Oral Arguments in this matter.

Based on the foregoing, it is thereupon;

ORDERED AND ADJUDGED:

1. That the Appellants' Motion to Abate Appeal and Remand with Instructions is DENIED.

2. That this Appellants' [sic] Request for Oral Argument is GRANTED. The parties will proceed as directed above.

DONE AND ORDERED in Chambers in Inverness, Citrus County, Florida this 11th day of May, 2009.

/s/
PATRICIA V. THOMAS
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by United States Mail, first class postage pre-paid, in hand delivery, or by courthouse mailbox to the following this 11th day of May, 2009.

[x] Luke Lirot, Esq. and Bryan R. Snyder, Esq., Luke Charles Lirot, P.A., 2240 Belleair Road, Suite 190, Clearwater, FL 33764

[x] Citrus County Attorney, Attn: Robert Battista, via courthouse mail.

Appendix D

/s/

Kathy Rector Judicial Assistant

Appendix E

IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT
IN AND FOR CITRUS COUNTY, FLORIDA

JOHN LAWSON and
JO ANNE LAWSON,
Appellants,

vs. CASE NUMBER: 2008-CA-007192
CE Case Number: 0707-007

CITRUS COUNTY, a political
subdivision of the State of Florida,
Appellee.
_____/

FINAL ORDER

John Lawson and Jo Anne Lawson appeal an Order of the Code Enforcement Special Master of Citrus County which determined that the Appellants were in violation of the Citrus County Land Development Code and imposed a fine. This Court has appellate jurisdiction pursuant to section 162.11, Florida Statutes (2008) and Florida Rule of Appellate Procedure 9.030(c)(1)(C). This Court, having reviewed the Appellants' Initial Brief, the Appellee's Answer Brief, the Appellants' Reply, having held Oral

Arguments on July 13,2009, and having reviewed the record and being otherwise fully informed of the premises, affirms the Order of the Special Master.

A. Facts and Background

1. John and Jo Anne Lawson, the "Appellants," are the current owners of the Cedar Key Fish & Crab Company ("Cedar Key Fish House"). The property has been utilized commercially as a fish house for many years and received "vested rights" for continued use as a wholesale/retail seafood business in 1976.

2. A 1986 zoning ordinance designated the property "CF" for Commercial Fishery. Upon initial adoption of the Land Development Code ("LDC") Atlas in 1990, the property was given the Coastal Lakes Residential ("CLR") designation. Both the "vested rights" and the valid non-conforming use recognition (as a result of the CLR designation) remain in effect.

3. For numerous stated reasons, the property was re-designated from CLR to Coastal Lakes Commercial ("CLC") on the Comprehensive Plan, Generalized Future Land Use Map ("GFLUM").[1] This

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[1] These reasons include that the change was requested by the owners of the property in recognition of its long established commercial use and prior "vested rights." County Staff approved of the change request to be consistent with the "Old

Comprehensive Plan Amendment, CPA-06-16, was adopted pursuant to Citrus County Ordinance 2006-A 16 on October 24, 2006. Thereafter, County Staff planned to update the LDC via Atlas Amendment (AA-07-02) to be consistent with the Comprehensive Plan (GFLUM element), but the application was later withdrawn at the direction of the Board of County Commissioners.

4. On February 6, 2007, the Appellants were granted a "2 COP" (consumption on premises) Alcoholic Beverage License by the Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco. A copy of the application included in the Appendix reveals that the Appellants checked the boxes on the forms for a "new license" with a designation as SSF (Stand-alone bar with Food). See Appendix II, #27. Correspondence from the County's Director of Development Services reveals that the County believed it was only a license

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Homosassa Plan," which would protect the historic nature of the remaining "fish houses." Additionally, the Department of Community Affairs ("DCA") encouraged updating the GFLUM down to the parcel level (below a ten acre threshold) during the EAR process. But see Debes v. City of Key West, 690 So. 2d 700, (Fla. 3d DCA 1997) (explaining impermissible spot zoning, spot planning in reverse, or specific-use oriented zoning).

renewal with review for compliance with the LDC section 4667.E.1, which allows the sale of wine and beer within a structure whose principle use is for the sale of groceries. See Appendix II, #26.

5. Due to numerous complaints in July of 2007, County officials started an investigation into alleged building code and public safety violations at the Cedar Key Fish House property. County Public Safety inspectors noted several fire and life safety violations.[2] Specific to this appeal, County Building Code Inspectors identified four violations of construction without a permit: installation of a fence, construction of a chickee,[3] replacement of a garage door, and the apparent operation of a tavern. The Appellants were formally notified of these violations on September 28, 2007. The Notice of Violation expired on October 31, 2007, without full resolution and the case proceeded to the Code Enforcement Board.

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[2] The record indicates that the Appellants eventually corrected all fire and life safety discrepancies. These public safety issues are not the subject of this appeal.

[3] "Chickees" are defined in section 553.73(9)(I), Florida Statutes. They must be built by the Miccosukee or Seminole Indian Tribes and are exempt from some requirements of the Florida Building Code.

6. After the notice of hearing was issued on November 2,2007, a public hearing was held on December 19, 2007, before the Citrus County Code Enforcement Board. The Board found the Appellants guilty of "change of use without a Level Two PDRB approval and permits." The Appellants were given until February 11, 2008, to abate the violations or face potential fines.

7. A hearing was held again on March 19, 2008. By this time, the County had adopted an alternative code enforcement system by changing code enforcement proceedings from a Board to a Special Master. At the March 19th hearing, the Code Enforcement Special Master noted that the Appellants were making good faith efforts to comply with the LDC and continued the matter until June of 2008.

8. In an effort to comply with the various code violations, the Appellants applied in March of 2008 for an Atlas Amendment to the LDC (AA-08-16) to designate the property as CLC [4] with a Planned Development Overlay (PDO-08-02) to address the

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[4] Changing the LDC designation for the property from CLR to CLC would address the fence violation. The Appellants were able to address the garage door replacement violation with an after-the-fact permit.

addition of a chickee and the change of use to a bar/tavern.

9. The matter was continued again on June 18, 2008, and again on August 20, 2008, until November after the Planning Development Review Board ("PDRB") held its hearing on AA-0816 and PDO-08-02.

10. On October 2, 2008, the PDRB attempted to hold a public hearing on AA-08-16 and PDO-08-02. However, too many members of the public attended the hearing, so the meeting was postponed until a larger public forum could be arranged. The public hearing was eventually held on November 18, 2008, where in yet another turn of events, the County Attorney advised that it was his opinion that the 2006 Comprehensive Plan Amendment CPA-06-16, which changed the Cedar Key Fish House's designation from CLR to CLC on the GFLUM, was inadequately advertised and therefore void. Members of the PDRB reasoned that moving forward on the Atlas Amendment and the PDO would be futile until the legal issue was resolved. As a result, the PDRB did not review AA-08-16 or the PDO-08-02.

11. On November 19, 2008, another hearing was held by the Code Enforcement Board Special Master. On December 9, 2008, the Special Master issued the Amended Findings of Fact and Conclusions of Law and Order which reviewed the violations and

the past finding of guilt. [5] The Order found that the structure had been modified to a restaurant and bar establishment, but to be in compliance, the Lawsons would have to obtain the proper zoning and obtain a permit for the structure. The Special Master remarked that the County provided new testimony that the structure sits 8 feet from the water's edge, but the Comprehensive Plan requires a minimum of a 15 foot setback. The Order noted that staff recommended denial of the pending PDO application because a development order could not be approved to change the structure's use (to a bar/tavern) in violation of the Comprehensive Plan's setback requirement. The Special Master commented that the opined invalidity of the 2006 GFLUM amendment may impact the property's designation on the GFLUM, but it does not affect the textual portions of the Comprehensive Plan that established the setback requirement. The Special Master reiterated that although the Cedar Key Fish House previously existed as a non-conforming use, any change of use must comply with the Comprehensive Plan. The Order concluded that "absent a textual amendment to the County's Comprehensive Plan, it appears only the restoration of the structure to its

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[5] The Building Code Inspector's Notice of Violation found the Appellants in violation of sections 2020, 2021, 2120, and 2321 of the LDC.

valid nonconforming state can abate the violation." As a result, the Special Master imposed a $25,000.00 fine and a continuing fine of $100.00 per day if the property remained in violation. It is this Order which the Appellants appeal.

B. Appellants' Initial Brief—Summary

The Appellants appeal the Amended Findings of Fact and Conclusions of Law and Order, which found the Appellants in violation of the LDC and imposed fines. The Appellant's Initial Brief set forth arguments, summarized as follows:

1. The maintenance of the code enforcement action, and any fines issued thereon, should be rendered void by the doctrine of equitable estoppel.

> The Appellants argue that because they relied in good faith on the County's approval of the 2COP zoning approval, they went through the effort of obtaining a state beverage license and made substantial changes in their position by incurring extensive obligations and expenses. Additionally, they argue that based on fairness and rewarding parties for their industry, it would be highly

> inequitable and unjust to destroy the rights the Appellants have acquired.

2. The code enforcement proceedings operated as a denial of the Lawsons' due process rights.

> Due process was denied by "prejudging the request for the PDO based solely on the recommendation of 'denial' by staff, before any determination was made by the PDRB." The AA and PDO applications were consistent with the Comprehensive Plan.

3. The imposition of the code enforcement fine was not supported by competent and substantial evidence.

> No evidence was presented to invalidate the 2COP wet zoning issued or to undermine the legitimacy of the PDO or AA and no actual determination was made by the PDRB when the code enforcement fines were imposed.

4. That the Lawsons' applications should have been viewed in a positive context during all code enforcement proceedings based on the fact that the applications were consistent with the Comprehensive Plan.

> Here, the Appellants argue that based on the historically commercial nature of the

> property, the vested lights determination, the current use of the property, and the doctrine of equitable estoppel, the use of the property is consistent with the Comprehensive Plan and it was improper to impose fines based on mere speculation that the applications would not be granted.

C. Appellee's Answer Brief—Summary

The Appellee's Answer Brief reviews the case history and the Amended Findings of Fact and Conclusions of Law and Order and makes the following arguments:

1. The Proper standard of review is not a de novo review, but rather, is limited to a review of the record before the Special Master.

2. The Appellants received adequate due process with notice and opportunity to be heard and failed to demonstrate an error upon which the Special Master's Order should be reversed.

3. The Appellants were previously found in violation of the LDC; therefore, the Special Master was authorized to impose the fine.

5. [sic] The Appellants' land use applications proceedings have no bearing on the issue of LDC

violations and whether the Special Master properly issued fines.

> The Appellee stresses that the Code Enforcement Master does not have jurisdiction over land use applications. The applications were only tangentially related to the code enforcement proceedings in that the Appellants were attempting to change the land use designation so that they could get permits and come into compliance with the LDC to avoid the Special Master's fines. Those application processes had nothing to do with whether the Special Master had the authority to impose fines or whether the decision was based on evidence.

D. Appellant's Reply Brief—Summary

In the Reply Brief, the Appellant concurred that the standard of review is an on-the-record review and not a de novo proceeding. They attached the transcript from the November 19, 2009, hearing before the Code Enforcement Special Master. The Appellants' arguments in Reply are outlined as follows:

1. The Evidence in transcript [sic] supports the application of the doctrine of equitable estoppel for the benefit of appellants.

> The Appellants point out that the transcript shows that they developed the equitable estoppel argument before the Special Master, reiterate that they relied upon the County's issuance of a 2 COP alcoholic beverage license to their detriment and add that the County's attempt to amend the GFLUM to change the properties designation back to CLC in 2006 was another act upon which the Appellants relied to their detriment.

2. The Record in this action reveals multiple denials of due process.

> The Appellants acknowledge that they were afforded adequate procedural due process, but set forth an argument that the Special Master had a conflict of interest that amounted to a denial of due process by acting as the Special Master at the same time as she represented the County on various appellate matters. Additionally, the Appellants suggest that it is a denial of due process to affirm the Special Master's Order while there is

confusion regarding the validity or invalidity of the 2006 Comprehensive Plan Amendment CPA-06-16. And finally, the Appellants disagree with the Special Master's legal conclusion. The Appellants cite numerous cases for the proposition that denying a variance can be unconstitutional.

3. The Appeal of the Final Order fully protects the Appellant's rights and no earlier appeal was necessary.

4. The land use changes are material to this code enforcement appeal.

E. The Oral Argument

1. At Oral Arguments, the Appellants started by contending that their due process rights were violated because of the Special Magistrates conflict of interest. Additionally, the Appellants reiterated their estoppel argument based upon the County's approval of the beverage license, the County's ill-fated 2006 attempt to change the zoning to commercial, and their good-faith attempts to comply with the comprehensive plan. Further, the Appellants argued that all of the delays were not their fault and that it was a denial of

due process for the Special Master to change her mind based upon the staff recommendations to the PDRB.

2. The Appellee argued that the Appellants waived their right to object to the Special Master and that the Special Master did not violated [sic] the statute prohibiting dual representation. The Appellee asserted that the standard of review was of the record before the Special Master, not the public records included in the appendix. Further, that all due process requirements for the hearings were met, and that the Special Master relied on the competent substantial evidence presented by the testimony of the Code Enforcement Officer, the Code Enforcement Manager, Dr. Pitts (a Senior Planner), and the Director of Development Services.

F. Standard of Review

1. The Appellants appeal the final administrative order of the Code Enforcement Special Master pursuant to Section 162.11, Florida Statutes (2008) ("An aggrieved party ... may appeal a final administrative order of an enforcement board to the circuit court."). Local Rules permit a single circuit judge to sit in an appellate capacity to review agency actions. See Circuit-wide Admin. Order 87-23. "Such an appeal shall not be a hearing de novo but shall be

limited to appellate review of the record created before the enforcement board." § 162.11, Fla. Stat. Although the plain language of the statute clearly indicates "appellate review" rather than "certiorari review," the circuit court's standard of review is essentially the same. See Victoria L. Cecil, The Appealing Nature of Local Code Enforcement Board Decisions, 82-MAY Fla. B.J. 42,44 (2008) (noting that the standard of review was the same, but there are substantial procedural differences between the two remedies). Accordingly, the standard of review for this appeal is best outlined by the Supreme Court of Florida as follows: "Where a party is entitled as a matter of right to seek review in the circuit court from administrative action, the circuit court must determine whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence." City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982).

2. "The Supreme Court of Florida has defined substantial evidence as 'such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred.'" Marion County v. Priest, 786 So.2d 623, 625 (Fla. 5th DCA 2001) (citing De Groot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957). "For the 'substantial' evidence to also constitute 'competent'

evidence, the evidence relied upon 'should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.'" Id. (internal citation omitted). Moreover, a circuit court may not reweigh the evidence or substitute its evaluation of the evidence for that of the Code Enforcement Special Master. See Id. at 625; see also Florida Power & Light Co. v. City of Dania, 761 So.2d 1089 (Fla. 2000) (improper for circuit court to conduct a de novo review and substitute its judgment for city's as to relative weight of conflicting evidence).

G. Analysis

1. Whether procedural due process is accorded.

The Appellants concede that they received adequate notice and opportunity to be heard throughout the proceedings. However, the Appellants also argue that the prejudging of the PDO based solely on the recommendation of "denial" by staff, the alleged conflict of interest of the Special Master, the confusion regarding the validity or invalidity of CPA-06-16, and the claim of incorrect legal conclusions by the Special Master, were a denial of due process. Most of these claims are not due process claims, but rather, they

relate to whether the essential requirements of the law have been observed. However, the alleged conflict of interest of the Special Master should be addressed as a due process argument.

To support the claim that the Special Master had a conflict of interest, the Appellants primarily rely on section 162.05(5), which states that "[t]he local governing body attorney shall either be counsel to an enforcement board or shall represent the municipality or county by presenting cases before the enforcement board, but in no case shall the local governing body attorney serve in both capacities. § 162.05(5), Fla. Stat. (2008)

The Appellants argue that the Special Master violated this statute by serving as the Code Enforcement Special Master at the same time as representing the County in certain appellate cases before the Fifth DCA. However, cases before the Fifth DCA are not matters before the enforcement board. Thus, the Special Master did not violate section 162.05.

Additionally, the Appellants cite lofty case law regarding the "appearance of impropriety." Bammac, Inc., v. Grady, 500 So. 2d 274 (Fla. 1st DCA 1986) ("Equally as important to the administration of justice as actual due process and fairness is the appearance of propriety."). There are strict due process requirements as to the neutrality of officials performing judicial or

quasi-judicial functions. Tumey v. Ohio, 273 U.S. 510 (U.S. 1927). Here, the Appellants suggests that the Special Magistrate is "institutionally conflicted" or may be motivated to reach certain conclusions in the County's favor. However, the Appellants' argument is mere speculation without any evidence to show that the Special Master has a direct, personal, or substantial pecuniary interest in reaching a particular conclusion. See Id. at 523.

In sum, the Appellants' have received adequate notice and opportunity to be heard. The Special Master did not violate the statutory prohibition of section 162.05(5), and there is no evidence that the Special Master was "institutionally conflicted." Therefore, proper procedural due process was afforded to the Appellants.

2. Whether the essential requirements of the law have been observed.

The Appellants' argument is that the Special Master "pre-judged the request for the PDO based solely on the recommendation of 'denial' by staff, before any determination was made by the PDRB" and then concluded that "absent a textual amendment to the County's Comprehensive Plan, it appears only the restoration of the structure to its valid nonconforming

state can abate the violation." Further, the Appellants disagree with the Special Master's statement that "[o]ne may not lawfully obtain a variance from the comprehensive plan."

The Special Master is correct that a development order approved by a governmental entity must be consistent with the comprehensive plan or each element or portion as adopted. § 163.3194(1)(a), Fla. Stat. (2008). The setback requirement for structures near river surface waters is 50 feet, which includes an "undisturbed" buffer within 15 feet of the high water mark. See § 4120 LDC, Citrus County. Thus, the Appellants could never present a prima facia [sic] case that the requested use of their land was consistent with the County's Comprehensive Plan as would be their burden. See Davis v. St. Joe Paper Co., 652 So.2d 907, 910 (Fla. 1st DCA 1995) (noting the extremely difficult burden placed on a party seeking to vary the use of property from that permitted by a comprehensive plan); see also City of Jacksonville v. Wynn, 650 So. 2d 182 (Fla. 1st DCA 1995); Machado v. Musgrove, 519 So. 2d 629 (Fla. 3d DCA 1987), review denied, 529 So.2d 694 (Fla 1988); City of Cape Canaveral v. Mosher, 467 So. 2d 468 (Fla. 5th DCA 1985).

Therefore, the Code Enforcement Special Master's conclusion that "[o]ne may not lawfully obtain

a variance from the comprehensive plan" and "absent a textual amendment to the County's Comprehensive Plan, it appears only the restoration of the structure to its valid nonconforming state can abate the violation," did not depart from the essential requirements of the law.

At the heart of the Appellants' defense is their estoppel argument. The Appellants argue that they relied to their detriment upon the County's issuance of a 2 COP alcoholic beverage license. Additionally, they argue that they relied to their detriment on the County's attempt to amend the GFLUM to change the property's designation to CLC in 2006. The law regarding estoppel claims against the government was recently explained by the First DCA as follows:

> Equitable estoppel is appropriate where the proof shows "(1) a property owner's good faith reliance (2) on some act or omission of the government and (3) a substantial change in position or the incurring of excessive obligations and expenses so that it would be highly inequitable and unjust to destroy the right he acquired." Equity Res. Inc. v. County of Leon, 643 So.2d 1112, 1117 (Fla. 1st DCA 1994) (quoting Franklin County v. Leisure Props., Ltd., 430 So.2d

475, 479 (Fla. 1st DCA 1983)). In a land use context, we said:

> One party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon. A citizen is entitled to rely on the assurances or commitments of a zoning authority and if he does, the zoning authority is bound by its representations, whether they be in the form of words or deeds. ...

Id. at 1120 (quoting Town of Largo v. Imperial Homes Corp., 309 So.2d 571, 573 (Fla. 2d DCA 1975)). Thus a necessary precondition for equitable estoppel against the government is a governmental act or omission that invites a citizen "onto a welcome mat"

City of Jacksonville v. Coffield, WL 886214, *5-6 (Fla. 1st DCA 2009).

In review, the question is whether the County's act of approving the "2 COP" Beverage License and attempting to change the properties land use

designation on the GFLUM from CLR to CLC invited the Appellants "onto the welcome mat" of expending resources to change their commercial fishery into a bar/tavern. In this case, the County did not issue a Beverage License. The State Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco issued the Beverage License. Citrus County only reviews the application for compliance with section 4667. E. 1 of the LDC. The County's attempt to change the land use designation from CLR to CLC was in recognition of Cedar Key Fish House's long established "vested rights" to operate as a Commercial Fishery and to be consistent with the "Old Homosassa Plan." These reasons do not convey permission to change the commercial fishery into a bar/tavern or establish "vested rights" to develop the property to another use. City of Fort Lauderdale v. Dept. of Veteran and Community Affairs, 424 So.2d 102, 103 (Fla. 1st DCA 1982) (stating that the mere act of rezoning does not constitute such an authorization to develop as it has long been held that property owners do not have a vested right in zoning ordinances.) Thus, the County has not invited the Appellants "onto the welcome mat" of expending resources to change their commercial fishery into a bar/tavern; therefore, the Appellants argument for estoppel is without merit.

Accordingly, the Code Enforcement Special Master's conclusions of law did not depart from the essential requirements of law.

3. Whether the administrative findings and judgment are supported by competent substantial evidence.

The Code Enforcement Special Master's Amended Findings of Fact and Conclusions of Law and Order reveals that she relied on the Code Inspector's Notice of Violation, the Code Enforcement Board's finding of guilt in December of 2007, and the testimony of County Staff that the structure sits 8 feet from the water's edge in violation of the Comprehensive Plan's setback requirements.

A review of the Transcript of the hearing on November 19, 2008, indicates that the Code Inspector testified that he filed an affidavit of non-compliance that the structure was still in violation for change of use and installation of a commercial wood fence without the Level Two PDRB approval. Additionally, Dr. Pitts from Community Development Division explained the problems regarding the validity or invalidity of CPA-06-16 and explained that the "chickee" portion of the structure was constructed

within the 15 foot undisturbed buffer required by the LDC.

After Dr. Pitts' testimony, the Appellants developed their theory of estoppel. However, the Appellants clearly confused zoning matters with code violations by arguing that no one was sure whether the 1990 or the 2006 version of the Comprehensive Plan was in effect and that the Special Master could not impose fines until the Parties were sure which version of the Comprehensive Plan the Appellants must comply. Thereafter, the Special Master heard testimony from members of the public who all generally supported the operation as a tavern/bar. After the members of the public spoke, the Special Master reviewed her findings, stated her conclusions, and imposed the fines as set forth in her written Order.

The testimony of Mr. Harms, the Code Inspector, and his affidavit of non-compliance, the testimony of Dr. Pitts regarding the setback requirements and the actual location of the structure, the testimony of Mr. Maidhof, the Director of Development Services, regarding the permit process, as well as the previous findings of the Code Enforcement Board, established a substantial basis from which the fact at issue could be reasonably inferred and was sufficiently relevant and material that a reasonable mind could accept as adequate to support the conclusion reached. Thus, the

administrative findings and judgment of the Special Master are supported by competent substantial evidence.

G. Conclusion

The Code Enforcement process employed by the County in this case accorded proper procedural due process, and the Code Enforcement Special Master's Amended Findings of Fact and Conclusions of Law and Order observed the essential requirements of the law and was supported by competent substantial evidence. Therefore, the Special Master's Order is affirmed.

It is so ordered.

DONE AND ORDERED in Chambers in Inverness, Citrus County, Florida this 4th day of Aug, 2009.

/s/
PATRICIA V. THOMAS
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by United States Mail, first class postage pre-paid, in hand

delivery, or by courthouse mailbox to the following this 4th day of August, 2009.

[x] Luke Lirot, Esq. and Bryan R. Snyder, Esq., Luke Charles Lirot, P.A., 2240 Belleair Road, Suite 190, Clearwater, FL 33764

[x] Citrus County Attorney, Attn: Robert Battista, via courthouse mail.

/s/

Kathy Rector Judicial Assistant

Appendix F

IN THE DISTRICT COURT OF APPEAL OF
FLORIDA
FIFTH DISTRICT

JOHN LAWSON AND JO ANNE
LAWSON,

Petitioner,

v. CASE NO. 5D09-3136

CITRUS COUNTY,

Respondent.
_____/

DATE: January 19, 2010

BY ORDER OF THE COURT

ORDERED that Petitioner's Motion to Accept Filing Out of Time, filed November 6, 2009, is granted. Further it is

ORDERED that the Petition for Writ of Certiorari, filed January 8, 2010, is denied.

Accordingly, Petitioner's Request for Oral Argument is moot.

I hereby certify that the foregoing
is (a true copy) of the original
Court order.
/S/ SEAL
SUSAN WRIGHT, CLERK

cc. Luke Lirot, Esq.
Gregg R. Brennan, Esq.

Appendix G

IN THE DISTRICT COURT OF APPEAL OF
FLORIDA
FIFTH DISTRICT

JOHN LAWSON AND JO ANNE
LAWSON,

Petitioner,

v. CASE NO. 5D09-3136

CITRUS COUNTY,

_____ /

Respondent.

DATE: February 25, 2010

BY ORDER OF THE COURT

ORDERED that Petitioner's Motion for Rehearing, Motion for Rehearing En Banc alternative Request for Issuance of Written Opinion and Memorandum of Law, filed February 3, 2010, is denied.

I hereby certify that the foregoing
is (a true copy) of the original

Court order.

/S/ SEAL

SUSAN WRIGHT, CLERK

cc. Luke Lirot, Esq.
Gregg R. Brennan, Esq.

CITRUS COUNTY
LIEBERMAN AS ATTORNEY FOR COUNTY
INVOICES

Date,	Inv No.,	Matter,	Amount,	PDF Pages
10/31/07		Riverside,	$150.00	35
11/30/07		Riverside (1)	$2,332.25	33 - 34
12/31/07		Riverside	$241.05	32
01/31/08		Riverside	$203.15	31
04/30/08		Halls River	$10,198.53	26 - 30
04/30/08		Riverside	$75.35	21
06/30/08		Riverside	$1,370.71	24 - 25
06/30/08		?	$385.00	23
06/30/08		Halls River	$385.00	22
08/19/08	50	Halls River	$787.47	19 - 20
09/10/08	68	Halls River	$1,725.75	17 - 18
10/06/08	74	Halls River	$500.38	16
11/10/08	91	Riverside	$250.00	14 - 15
12/10/08	113	Halls River	$15.00	13
12/10/08	112	Riverside	$107.40	11 - 12
02/02/09	194	Halls River	$2,239.40	9 - 10
03/09/09	228	Riverside	$240.00	8
04/03/09	279	Halls River	$90.00	7
04/03/09	277	Riverside	$2,345.71	5 -6

05/05/09	284	Halls River	$1,836.92	3 - 4
05/05/09	296	Riverside	$260.30	1 - 2
		TOTAL	$25,739.37	

(1) May have included copies for a second case

CODE ENFORCEMENT SPECIAL MASTER
CITRUS COUNTY, FLORIDA

CITRUS COUNTY,
Petitioner

v.
JOHN & JoANNE LAWSON
5590 S. Boulevard Dr.
Homosassa, FL. 34446
Respondents.
_____/

CEH Case No. 0707-007
5590 S. Boulevard Dr.
Homosassa, FL.

AFFIDAVIT OF THOMAS H. WILLIFORD, AIA
IN SUPPORT OF
MOTION FOR STAY PENDING REVIEW

STATE OF FLORIDA)
COUNTY OF CITRUS)

BEFORE ME, the undersigned authority, personally appeared Thomas H. Williford, AIA, of the community of Holder, Citrus County, Florida, this 14

day of September, 2009, who, after being duly deposed and sworn, states as follows:

1. My full name is Thomas H. Williford, AIA, and I have full personal knowledge of the matters addressed herein.

2. I am over eighteen (18) years old, and I reside in Citrus County, Florida.

3. I am in practice as a licensed architect in the State of Florida, practicing in Citrus County.

4. I have served as architect for Respondents herein, and have attended at Appellants' business, Cedar Key Fish & Crab of Homosassa on various occasions.

5. I was present at Cedar Key Fish on Wednesday, September 2, 2009 for an inspection conducted by eight staff members of the Citrus County government.

6. I attended again at Cedar Key Fish on September 13, 2009 for the purpose of taking the measurement described in ¶ 16, infra.

7. My current resume is attached as Exhibit A to this my Affidavit.

8. Based on the foregoing, I am competent to testify as to the facts set out herein and to offer the expert opinions set out herein and would be competent to testify as to such facts and opinions if called to do so at trial.

9. The inspection of Citrus County described in ¶ 5, supra, was announced in a letter from Peter Aare, Senior Assistant County Attorney, to Luke Lirot, Esq., dated August 31, 2009. A copy of said letter is attached as Exhibit B to this Affidavit.

10. According to Mr. Aare's letter, the purpose of the inspection of Cedar Key Fish was:

> ... that the Citrus County Building Division, Fire & Rescue Department, and Code Compliance Division intend to conduct inspections of the premises located at 5590 S. Boulevard Drive, Homosassa, Florida, commonly known as Cedar Key Fish & Crab of Homosassa, the "Fish House," and the "Freezer," to include all of the grounds and all buildings, structures, and facilities thereon. The inspection will be for the purpose of investigating violations of the Florida Building Code, Florida Fire Prevention Code and, [sic] Life Safety Code; the Citrus County Code of Ordinances, and the Citrus County Land Development Code.

11. The inspection was attended by eight County officials:

> Senior Assistant County Attorney Peter Aarc
> Eber Brown Deputy Assistant County Administrator
> Kenneth Clammer, Assistant Fire Chief
> Michael Brennan, Fire Inspector
> Mr. Knowls from Code Enforcement
> Edward Bertoli, Building Inspection Supervisor,

Jim Baird, Assistant Building Division Director
John Ruppert, Construction Inspector, Building Division

12. No formal results from said inspection have yet been received, more than one week later.

13. In participating in the inspection with County staff, they and I observed several minor issues that require remediation to achieve full compliance with the codes cited in Mr. Aare's letter.

14. However, neither County staff nor I observed any code violations anywhere on Appellants' property that have the potential to endanger the public health, safety and welfare.

15. On September 13, 2009, I returned to Cedar Key Fish to measure the distance between the Tiki hut and the water to determine compliance with

Policy 17.31.8 of the Future Land Use Element of the Citrus County Comprehensive Plan.

16. At the point closest to the water, the Tiki hut is 15 feet 3 inches away from the water.

17. I have given the facts set forth in this Affidavit voluntarily, recognizing that it is to be used in submission in an administrative proceeding or in a court of law and under oath.

18. I have given this statement freely and voluntarily.

FURTHER AFFIANT SAYETH NAUGHT

/S/
THOMAS H. WILLIFORD STAMP

STATE OF FLORIDA
COUNTY OF Alachua

The foregoing instrument was acknowledged before me this 14 day of September, 2009, by Thomas H. Williford, who is personally known to me or who has

produced a Fl. Driver License as identification and who did take an oath.

/S/
Notary Public

My Commission Expires: Feb. 7, 2013

Respectfully submitted

/S/
Luke Lirot, Esquire
(email: luke2@lirotlaw.com)
Florida Bar Number 714836
Bryan R. Snyder, Esquire
(email: bryan@lirotlaw.com)
Florida Bar Number 042340
Luke Charles Lirot, P.A.
2240 Belleair Road, Suite 190
Clearwater, FL 33764
Telephone (727) 536-2100
Facsimile (727) 536-2110
Attorneys for the Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing via U.S. mail to Gregg R. Brennan, Esq., Assistant County Attorney, 110 North Apopka Avenue, Inverness, Florida, 34450, Ms.

Kimberly Corbin, Director, Code Compliance Division, 3600 West Sovereign Path Lecanto, Florida, 34461, and Michele Lieberman, Esq., 2805 Highway 44 West, Inverness, Florida, 34453, on this 14th day of September, 2009.

/S/
Luke Lirot, Esquire

[EXHIBITS OMITTED]